In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 539.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Pursuant to the opinion and judgment of this court upon the former appeal (*Burton* v. *United States*, 196 U. S. 283), Burton was retried, upon a new indictment, at the September term, 1905, of the Circuit Court for the Eastern District of Missouri, Judge Van Devanter presiding.

The indictment (R., 3–16), in eight counts, charged in substance two offenses, under section 1782 of the Revised Statutes:

1. That Burton, while a Senator of the United States, agreed with the Rialto Grain and Securities

Company, at St. Louis, to receive certain compensation ($2,500) for services to be rendered by him in relation to a certain proceeding, matter, or thing before the Post-Office Department in which the United States was interested.

2. That, while a Senator of the United States, he received compensation ($500) for certain services rendered by him in relation to such proceeding.

The proceeding referred to was described as "a proceeding for determining whether said corporation had been and was engaged in conducting a scheme for obtaining money from persons then resident in divers parts of the United States, through the mails of the United States, by means of false and fraudulent pretenses, representations, and promises," and whether the Postmaster-General should instruct the postmaster at St. Louis to return all registered letters and other mail matter directed to said corporation to the post-offices at which mailed, to be returned to the senders with the word "Fraudulent" plainly written or stamped upon the outside thereof, and whether the Postmaster-General should forbid the payment by the postmaster at St. Louis to the said corporation of all postal money orders drawn to its order or in its favor, and require the return to the several remitters thereof of the several sums named in such money orders.

The services rendered or to be rendered were alleged to consist of "Burton's appearing before the said Post-Office Department and before the said Postmaster-General, the chief post-office inspector, and the Assist-

ant Attorney-General for said Post-Office Department, and other officers of said Post-Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations, and persuasion, inducing the said Postmaster-General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post-Office Department and by the said Postmaster-General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post-office at St. Louis" to return the registered letters and other mail matter directed to the corporation, and from forbidding the payment to it of postal money orders. (Sixth count, R. 11, 13.)

The first, second, fourth, sixth, and eighth counts charged the agreement to receive compensation, and substantially differed only as to the interest of the United States alleged in said proceeding, whether direct or indirect, or both.

The third, fifth, and seventh counts charged the receipt of compensation differing likewise as to the nature of the interest of the United States alleged in said proceeding, whether direct or indirect.

The third, fifth, and seventh counts were based upon the cash payment of $500 to Burton at St. Louis on March 26, 1903. This court having held, on the former appeal, that the checks mailed to Burton and cashed by the Riggs National Bank in this city constituted receipt of compensation here, those checks entered into the present prosecution only as they went to make up the sum of $2,500 which he was charged by the other counts with having agreed to receive.

Defendant filed a demurrer to the indictment and to each and every count thereof. (R., 17.) The district attorney then moved that the indictment, as to the fourth and fifth counts, be dismissed (R., 19), which motion the court granted, but overruled the demurrer to the other counts. (R., 19.)

Defendant then filed a plea in bar to the third and seventh counts (which charged the receipt of compensation), on the ground that he had been acquitted of the offense charged therein at the former trial (R., 20). To this plea the United States filed a replication, or answer, afterwards substituting an amended answer (R., 23, 24), to which defendant demurred (R., 30). The court overruled this demurrer, and, the defendant declining to plead further, overruled and denied the plea in bar (R., 29).

Defendant was thereupon arraigned, and plead not guilty. A jury was impanelled and the case proceeded to trial.

The jury returned a verdict of guilty upon each of the several counts remaining in the indictment (R., 33).

Motions for new trial and in arrest of judgment were made and overruled (R., 34), and the court rendered judgment and sentenced defendant upon the verdict given upon the sixth and seventh counts of the indictment, imposing six months' imprisonment in the county jail and a fine of $2,000 for the offense covered by the sixth count, and six months' imprisonment (to run concurrently with the term imposed upon the sixth count) and a fine of $500 for the offense covered by the seventh count, and adjudging upon both counts that defendant was forever rendered incapable of holding any office of honor, trust, or profit under the Government of the United States (R., 35).

Thereupon defendant sued out this writ of error.

THE STATUTES.

Section 1782, Revised Statutes, provides:

> No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending

> against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

This statute was taken from the act of June 11, 1864, the language of which is substantially the same. The bill as originally introduced made it an offense for a Senator or Representative to act as counsel, with or without compensation, in any court, in a cause in which the United States was a party or directly or indirectly interested, or to receive compensation of any kind for services of any description rendered by himself or another in relation to such cause or proceeding. This provision was subsequently stricken out. (Cong. Globe, 38th Cong., 1st sess., pp. 555–561.)

Sections 3929 and 4041, Revised Statutes, known as the "fraud order statutes," as amended by the act of September 19, 1890 (26 Stat., 466), are as follows:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, repre-

sentations, or promises, instructs postmasters at any post-office at which registered letters arrive directed to any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any

kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein, shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.

Section 4 of the act of March 2, 1895 (28 Stat., 963) provides "that the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all other matter sent by mail."

ARGUMENT.

The assignments of error are numerous, but they may be grouped under several headings.

AS TO WHETHER THE INDICTMENT PRESENTS A CASE WITHIN THE STATUTE.

The case presented by this indictment is substantially the same as that before this court on the former appeal, which was held to be within the statute. (196 U. S., 295.)

This indictment does not set up, as a part of the alleged matter before the Post-Office Department, whether the Rialto Grain and Securities Company violated section 5480 of the Revised Statutes, which provides for the punishment of persons sending letters through the mails with intent to defraud, for the reason that the Circuit Court, in overruling an indictment framed along that line, held that the Postmaster-General had nothing to do with determining whether that section had been violated—that that was a matter for the investigation of the grand jury, and that sections 3929 and 4041 alone presented a matter for the determination of the Postmaster-General, namely, whether a fraud order should be issued. As the Circuit Court said, this point as to section 5480 was not made in respect to the former indictment and was not passed upon by the courts.

The matter alleged to have been before the Post-Office Department is denominated in the present indictment a "proceeding." In view of the practice in such case, this is clearly the proper designation.

Undoubtedly it was this fraud-order proceeding, and the services alleged to have been rendered in relation thereto, that the court had in mind when it said that the former indictment presented a case within the statute. The fact that the present indictment charges an agreement to receive compensation, as well as the receipt of compensation, does not enter into the determination of this question, as both relate to services rendered or to be rendered in relation to said fraud-order proceeding.

THE PLEA IN BAR.

The plea in bar (R., 20) sets up that at the former trial Burton had been acquitted of the offense charged in the third count of the original indictment, and that the offense so charged was the same as the offense charged in the third and seventh counts of the present indictment.

The amended answer to this plea alleged (R., 24, 29):

> That in counts one and two of the original indictment against the said defendant, Joseph Ralph Burton, the said defendant was charged with accepting five hundred dollars ($500.00) from the *Rialto Grain and Securities Company*, a corporation, for services performed for said company by said defendant, whereas in count three of said original indictment, partially set out in said plea in bar, said defendant was charged with accepting five hundred dollars ($500.00) from one *W. D. Mahaney, an officer and employe of said Rialto Grain and Securities Company*, for

the same services mentioned in said counts one and two.

The said defendant, Joseph Ralph Burton, was duly convicted by the jury as charged in said counts one and two of said original indictment, and judgment pronounced upon said verdict.

That said defendant prosecuted an appeal from said verdict and judgment to the Supreme Court of the United States, wherein a new trial was in effect granted the said defendant.

* * * * *

And the United States further answering says that the offense charged against said defendant, Joseph Ralph Burton, in said counts three and seven of the indictment herein is identical in legal effect with the offense charged in said counts one and two of said original indictment, but that the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment, as will appear from an examination of said counts.

To this answer defendant demurred.

Counts one and two of the original indictment were intended to cover the case of the receipt of the compensation mentioned from the Rialto Grain and Securities Company; count three, that of receipt from W. D. Mahaney personally, the words "an officer and employee of said Rialto Grain and Securities Company" being used merely for the purpose of identification.

Count 3 of the present indictment charges the receipt of the $500 from "said corporation;" count 7, from

"said corporation, through its officers, agents, and attorneys." The words "through its officers, agents, or attorneys" describe the medium or channel of payment, and in no wise alter the charge that the money was received from "said corporation." These counts are therefore identical in law with counts 1 and 2 of the original indictment, upon which Burton was convicted, which charged receipt from the company, and are not identical with count 3, upon which he was acquitted, which charged the receipt from Mahaney. The defendant would doubtless have claimed a variance if the proof had shown receipt from Mahaney personally, when the indictment alleged receipt from the company.

But even if it were otherwise—if the counts in question were precisely alike—Burton could not take advantage of the verdict of acquittal on the third count at the former trial. The effect of granting a new trial is to nullify entirely the proceedings at the former trial, as this court declared in *Trono* v. *United States*, decided December 4, 1905, and in which a petition for rehearing was recently denied.

Although the Trono case related to procedure in the Philippines, the court expressly decided it upon principles applicable to the Federal courts in this country. There is no difference in principle between it and the present case, and the broad rule announced therein necessarily includes one like this. The court said:

> In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of

> guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction *opens up the whole controversy and acts upon the original judgment as if it had never been.* The accused by his own action has obtained a reversal of the *whole judgment*, and we see no reason why he should not, upon a new trial, be proceeded against *as if no trial had previously taken place.*
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> * * * * *
>
> When at his own request he has obtained a new trial, he must take the burden with the benefit, *and go back for a new trial of the whole case.*

If the position of the defendant be correct, then the verdict of acquittal upon the third count has a greater effect than the verdict of conviction upon the first and second counts; and this court did an idle thing when it reversed the case and remanded it for new trial, since if such acquittal stands despite the reversal no new trial could be had of the matter in question. That the action of the jury in respect to the third count was noticed by this court in its consideration of the case is evident from its statement of the case wherein it is said:

> * * * The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. *Upon the third count the jury rendered a verdict of not guilty.* Upon the fourth and fifth counts the Government entered a *nolle prosequi.*

The third, fourth, and fifth counts concededly charged but one offense, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of $500 in cash to defendant at St. Louis on the 26th day of March, 1903. (196 U. S., 286.)

THE CHALLENGES FOR CAUSE.

It is claimed that the court erred in overruling the challenge for cause made by defendant to juror William V. Jones, and in sustaining the Government's challenge to juror Hugo Koehler.

As to Jones, the record shows that while he had formed an opinion from reading the newspaper reports of the former trial, he belived he could render a verdict in accordance with the evidence and the law; that he did not know the defendent; that the opinion he had formed could exert no conscious influence over him; and that he could give to the defendant the presumption of innocence to which he was entitled throughout the trial. (R., 37–41.)

The only ground for excepting to this juror—who it is apparent from his answers was unusually conscientious—was his statement that the opinion he had formed might exert an *unconscious* influence over him. But as he was manifestly an honest, fair-minded, intelligent man, the court properly held that this uncertain and indefinite metaphysical hypothesis did not disqualify him. Moreover, he did not sit in the case, as the record shows. (R. 42.)

Koehler, on the other hand (Rec. 38–40), not only had formed an opinion which he had expressed several times, but he was personally acquainted with the defendant, and was also acquainted with Mr. Thomas B. Harlan, attorney for the Rialto Company, associate counsel with Burton during the period covered by the indictment, and a witness at the former trial, and had conversed with Harlan about the case, which conversation he admitted had had its influence in forming his opinion. (R. 38–40.)

THE NUMBER OF PEREMPTORY CHALLENGES.

Section 819, Revised Statutes, provides:

> When the offense charged is treason or a capital offense the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other *felony*, the defendant shall be entitled to *ten* and the United States to three peremptory challenges; and in *all other cases*, civil and criminal, each party shall be entitled to *three* peremptory challenges.

In creating the offense covered by section 1782, Revised Statutes, Congress declared it a misdemeanor. The power to classify offenses is necessarily involved in the power to create them. There can be no doubt as to the power of Congress to create, since there are no common-law offenses against the United States. All are of statutory origin, and can be no other than Congress declares them to be. The designation by Congress of an offense as a felony or a misdemeanor shows the degree of abhorrence with which the legis-

lature regarded it, and is a guide to the courts in determining what principles and rules should be applied in prosecuting the offender.

When Congress has failed to classify the offense, it may become the duty of the courts to determine its grade, in doing which they would be guided by the principles of the common law as to the classification of like or similar offenses. Where, however, Congress has classified an offense, the courts have nothing to do but follow that classification.

In determining the grade of an unclassified offense, the fact that the punishment imposed is or may be infamous in its character—that is, involve imprisonment in the penitentiary—does not necessarily make it a felony. That will depend upon the nature of the offense—whether it involves that depth of depravity and moral turpitude which characterize felonies at common law, such as murder, arson, burglary, robbery, etc.

The misconduct covered by section 1782 was not an offense at common law, and, while serious enough, plainly does not fall in the same category as the common-law felonies. It naturally belongs in the misdemeanor class, and was properly so termed by Congress.

In *Bannon and Mulkey* v. *United States* (156 U. S., 464) this court held that a conspiracy to commit an offense against the United States—aiding and abetting the landing of Chinese in violation of the exclusion laws—was not a felony. The statute under which the prosecution was brought (section 5440, Revised Statutes)

provides for a fine not exceeding $10,000 or imprisonment not exceeding two years, or both, but does not classify the offense of conspiracy. In delivering the opinion of the court, Mr. Justice Brown said that it was too clear for argument that a conspiracy "to commit *any* offense against the United States" was "not a felony at common law;" and, referring to offenses created by statute, he said (p. 467):

> Neither does it necessarily follow that because the punishment affixed to an offense is infamous the offense itself is thereby raised to the grade of a felony. The word "felony" was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt. (4 Bl. Com., 94, 95; 1 Russell on Crimes, 42.) Certainly there is no intimation to the contrary in Mackin's case, which was put wholly upon the ground that, at the present day, imprisonment in a State prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment were made the sole test of felonies it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax and other analogous offenses under the internal-revenue and customs-revenue laws, would be treated as felonies. * * * By statute in some of the States the word "felony" is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the State

> prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender.

Reagan v. *United States* (157 U. S., 301) was a prosecution for a violation of section 3082, Revised Statutes, relating to concealing, buying, selling, or transporting smuggled goods. The statute provides for a fine not exceeding $5,000 or imprisonment not exceeding two years, or both, but does not classify the offense. The defendant claimed 10 preemptory challenges, but the court held otherwise. Mr. Justice Brewer, after quoting with approval its language in the *Bannon* case, said (p. 303):

> But in this case we need not refer to the common law for a classification of the offense. Section 2865, Revised Statutes, provides that "if any person shall knowingly * * * smuggle, etc., every such person * * * shall be deemed guilty of a misdemeanor. * * *" By this section smuggling is *in terms declared a misdemeanor.* The penalty imposed is substantially the same as that by section 3082. * * * The latter offense is subordinate to the former. It therefore can not be an offense of a higher grade.

This plainly recognizes the right of Congress to classify offenses, and that such classification determines their character for the purpose of fixing the number of challenges allowed under section 819.

In *Considine* v. *United States*, 112 Fed. Rep., 342, a prosecution for a violation of section 5478, Revised Statutes—breaking into a post-office—which provided a fine not exceeding $1,000, or imprisonment not exceeding five years, it was contended that the offense charged was a felony, which entitled the defendant to ten peremptory challenges. The statute did not classify the offense. Mr. Justice Day (then circuit judge) delivered the opinion of the Circuit Court of Appeals. After pointing out the changed situation with respect to the test of what constituted a felony, and referring to the classification which, by statute, has been adopted in most of the States, he said (p. 345):

> Congress would have relieved the situation of much uncertainty had the general practice in State legislation been followed in dividing crimes according to punishment between the grades of felonies and misdemeanors. As this has not been done, and as there is no definition of felony in the statutes of the United States, its meaning must be ascertained from the construction given to the term in Federal decisions of authority. From such authorities certain general rules may be said to have been established. *When a statute says that a certain offense shall be a misdemeanor, that fixes its character for the purpose of determining the number of challenges to which the accused is entitled, regardless of the original character of the offense.* (Citing cases.)

The judgment of conviction was therefore affirmed. An application for certiorari was made to this court, but the petition was denied. (184 U. S., 699.)

The same rule was expressly announced in *Jewett* v. *United States*, 100 Fed. Rep., 832, 840, and in *Tyler* v. *United States*, 106 Fed. Rep., 137, 138. See also *United States* v. *Coppersmith*, 4 Fed. Rep., 198 et seq.; *United States* v. *Daubner*, 17 Fed. Rep., 794, 795.

But, supposing the rule were otherwise, has the defendant any just ground for exception? So far as the record shows, the jury selected was entirely satisfactory to him, and he did not exhaust the number of challenges allowed (R., 42). Jones, to whom alone he appears to have excepted, did not remain on the jury. He made his claim to ten challenges in advance of the selection of the jury, and did not afterwards renew it. To entitle him to take advantage of the point here, he must have exhausted his three challenges and then proceeded to renew his demand by making further peremptory challenges. (*Insurance Co.* v. *Hillman*, 188 U. S., 208, 211, 212; *State* v. *Fournier*, 68 Vt., 262, 266; *Allen* v. *Waddill*, 26 S. W. Rep., 273.) The right to challenge is the right to reject, not to select a juror; and if from those who remain an impartial jury be obtained, the constitutional right of the accused in that respect is preserved. (*U. S.* v. *Marchant*, 12 Wheat., 480, 482; *Hayes* v. *Missouri*, 120 U. S., 68, 71.)

AS TO WHETHER THERE WAS SUFFICIENT EVIDENCE OF GUILT TO BE SUBMITTED TO THE JURY.

The present record, it is believed, presents a much stronger case against the defendant than that before the court on the former appeal, and deserves a more

decided affirmation of its sufficiency. Some new testimony was introduced—notably that of Charles H. Brooks—and the significance of that presented at the former trial more clearly brought out.

The case, as presented by the evidence, is as follows:

The Rialto Grain and Securities Company was organized and incorporated at St. Louis on September 2, 1902. (Rec., p. 43.) The company was the successor of the Brooks Brokerage and Commission Company, and dealt largely in margins on grains and securities. In short, it was an incorporated bucket shop. The Brooks Brokerage and Commission Company was organized and operated by Charles H. Brooks, who, in June, 1902, entered into an arrangement with Hugh C. Dennis under which Dennis took charge of the business of the company. A controversy between Brooks and Dennis subsequently ensued, Brooks claiming a right to reenter the company and Dennis denying that right. Charges were preferred against the company by Brooks, the result being an investigation by the Post-Office Department as to whether the Brooks Company was operating a scheme to defraud through the medium of the United States mails. Owing to the controversy with Brooks and the complications that ensued, it was no longer practicable, nor, indeed, possible, to continue business under the old name, and the result was the reorganization of the Brooks Company under the name of the Rialto Grain and Securities Company, which continued to occupy the same offices and to engage in the same business as the old company. (R., 112, 129.)

The Rialto Company's business was conducted almost exclusively through the United States mails, the company having a capacity of getting out several thousands of letters a day. (R., 131, 144.) It is obvious that the continued use of the mails was vital to the existence of the company, and that the issuance of a fraud order would have abruptly terminated that existence. It was expected that Brooks's fight on the old company would result in an indictment against Dennis as manager of that company for use of the mails in a scheme to defraud. (R., 112, 113.) Facts warranting an indictment would, of course, have imperatively demanded the issuance of a fraud order by the Post-Office Department. That this was well known to and anticipated by Dennis is evidenced by the organization of the Rialto Company, so that when an indictment was returned against him and others connected with the old company, that company had ceased to exist, although the business really continued under another name.

It is significant that although, as Harlan testified, Dennis controlled the company (R., 127) his name does not appear in its articles of incorporation, either as an incorporator or as a member of the board of directors (R., 43, 44).

The nature of the business transacted by the Rialto Company soon caused complaints to be made to the Post-Office Department, the first of these complaints reached the Department October 31, 1902 (R., 50, 89); the second, November 1, 1902 (R., 48, 88); the third,

November 4, 1902 (R., 71, 89); and the fourth, January 16, 1903 (R., 67, 89). The first two complaints were, on November 7, 1902, sent to the post-office inspector in charge at St. Louis for investigation and report (R., 95).

The third and fourth complaints were sent to St. Louis for the same purpose on November 8, 1902, and January 21, 1903, respectively (R., 97, 99, 100). The first complaints were received at St. Louis on November 10, 1902 (R., 106), and *a preliminary investigation of the Rialto Company* was made on *November 14, 1902* (R., 107, 109). This preliminary investigation was made at the offices of the Rialto Company, and the fact that this investigation was being made was brought to the personal attention of Thomas B. Harlan, who was the attorney and representative of the company (R., 107, 109, 230).

On the 17th of November, 1902, three days after the preliminary investigation of the Rialto Company, and while a general investigation was pending, Burton appears on the scene for the first time (R., 112, 127). In company with one Kastor he appeared at the Rialto Building, in which the Rialto Company was located, and Harlan, at the suggestion of Dennis, accompanied Burton and Kastor to the depot, from which place they proceeded by train to Chicago (R., 127). Harlan testifies that he explained to Burton all about the Brooks Company and the trouble it had experienced and was then having with the Post-Office Department (R., 128), and that he also explained in great detail the nature of

the business conducted by the Rialto Company (R., 129, 131), and that Burton asked, "Now, how are you going to avoid any trouble with your Rialto Company?" (R., 132), and later, "Now, with your Rialto Grain and Securities Company, how are you going to avoid any similar difficulty, any trouble with the Post-Office Department with your Rialto Company?" (R., 45); that he made it plain to Burton that the Rialto Company was doing an extensive business through the mails (R., 144).

After a very full discussion Harlan suggested to Burton that he become associated with him "*as counsel for the Rialto Grain and Securities Company*" (Harlan's testimony, R., 130, 132, 133). Harlan says Burton finally proposed to represent the company at a salary of five hundred dollars per month for a period of not less than five months (R., 132, 133). Burton in his testimony says of this interview on the train: "There was a very elaborate discussion of the business and purposes of the Rialto Grain and Securities Company, that is, I mean the kind of business it contemplated" (R. 234).

Harlan returned to St. Louis from Chicago on the morning of the 18th, and Burton went to Washington. Soon after Harlan's arrival he presented to the Rialto Company Burton's proposal, which was immediately accepted by the company, and Harlan evidently by prearrangement thereupon wired Burton to that effect. Later in the day (November 18) he wrote Burton in part as follows:

> Mr. Kastor and I arrived safely and on time this a. m. I found myself confronted with a number of engagements, which, together with Major Dennis's condition, prevented me from wiring you at as early an hour as I expected. However, I hope you received my message to the effect that this company *accepts your terms* to act as counsel at a salary of $500 per month, said services to begin immediately; that is, of this date, November 18, 1902 (R., 112).

In this letter Harlan restated the Brooks matter at length, and referred to the possible indictment of Dennis, but added:

> Up to the present time no indictment has been found. The Federal grand jury will probably be discharged this week. I do not know what reports have been sent into the Post-Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the grand jury, I shall wire you at once. (R., 113.)

Upon the receipt of this letter Burton, as appears from his letter of the 20th in reply, went at once to the Department (R., 114). His letter shows, however, that he appeared there not simply as attorney for Major Dennis, as he afterwards represented, but as attorney for the company, and is entirely inconsistent with his contention that it was understood that he was

to have nothing to do with matters concerning the company before the Post-Office Department.

He tells Harlan that he has found "that there are two complaints lodged against your company." He advises that all complaints receive special attention by the company, adding "especially should this be your motto until after this Brooks matter is entirely out of the way." He says further, "*I have arranged with the Department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary.*" Obviously he was referring to a hearing as to whether a fraud order should be issued against the Rialto Company. "I have assured the Department," he says, "that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department." This significant sentence follows: "*No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had.*" It is equally clear that Burton meant that no fraud order would be issued by the Department without giving him notice. The next sentence plainly shows his understanding of the nature and scope of his employment, for he says: "*In return*, if agreeable, you may make remittance for my first month's pay."

Notwithstanding the clear and unequivocal statements in this letter as to the assurances he had offered in behalf of the company and the arrangements he had made to protect it against hostile action by the Department, Burton testified at the trial that he went

to the Department on this occasion simply "to satisfy myself with respect to the standing of this company in the Department. That was the motive of the inquiry" (R., 258).

Chief Inspector Cochran testified that when Burton appeared before the Department on this occasion "he asked whether any complaints had been received, *or any investigation was under way*, with reference to the Rialto Grain and Securities Company," and that he "*told him there was such a case* and gave him the name of the complainants on whose complaint the case was jacketed" (R., 159). Upon being asked whether the information that he gave Burton was information to which anyone inquiring was entitled to, Cochran said that he would have given anyone inquiring, probably, the fact that a case had been made up, but that he would not have given to him the names of the complainants." The names he said he gave to Burton "because he was a Senator of the United States" (R., 159–160). Cochran also testified that Burton *said to him* on this occasion that the Rialto Company was all right (R., 174).

That Burton's proposal contemplated immediate service upon its acceptance is certain from Harlan's letter of November 22 to Burton, for in that letter he inclosed "the company's check for $500, as per agreement. This check should have been sent in my former letter, but I neglected to do so." The former letter was the letter of November 18 notifying Burton of the acceptance of his terms. (R., 115.)

On December 2 Harlan wrote Burton at some length, the letter beginning as follows:

> On Saturday night I wired you that indictments had been returned, bonds given, etc. * * * Thus you see that all efforts to prevent this action were defeated almost before we got started. *The question is how to meet the situation as it now exists.* As was to be expected, the fact of the indictments was telegraphed as a news item all over the country. To-day's mails have brought in several communications threatening in their nature, and the balance of the week will probably bring a great many more. * * * In all such cases we have determined to stand strictly on our rights, *and the result will probably be numerous complaints pouring into Washington* from different parts of the country. * * * *Locally*, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. *At your end of the line you will, of course, use your own judgment in handling the situation.* We will at all times be glad to observe any request made by the Post-Office Department, or to submit to any examination that they may direct. (R., 116, 117; italics mine.)

Harlan testified that the telegram of Saturday night "was in substance the same as the language contained in the letter referring to the telegram." (R., 197.) Burton did not deny receiving either the telegram or the letter, but it will be noted that he did not produce the telegram.

Mr. Paul V. Keyser, an assistant attorney in the office of the Assistant Attorney-General for the Post-office Department, testified that Burton appeared at that office before 9 o'clock on Monday, December 1, 1902, and "asked for the head of the office." Mr. Keyser remembered distinctly the date because Burton directed attention to the fact that Congress convened on that day, and that he had to be at the Capitol at 12 o'clock. (R., 181.) Keyser turned Burton over to Francis C. Huebner, who was also connected with the office, and who testified that Burton waited about half an hour to see Mr. Tyner, the head of the office, and that he was with Mr. Tyner for about half an hour. (R., 183.) Burton does not attempt to deny that he went to the Department as detailed by these two witnesses, neither does he deny that he saw Assistant Attorney-General Tyner on that occasion. He simply disclaims any recollection of the matter. He admits that he was but little acquainted with Mr. Tyner, and notwithstanding that he appeared at the Department before office hours and waited for half an hour, and was closeted with Mr. Tyner for a like length of time, he is unable to give any explanation as to why he was there. (R., 248, 249.)

I submit that a careful reading of the letter of December 2d and the testimony of Harlan previously referred to as to the contents of the telegram he had sent Burton on the Saturday night before furnish ample explanation as to Burton's motive and purpose in going to the Post-Office Department before office hours on

Monday morning and interviewing the officer of that Department charged under the regulations of the Department with the duty of recommending the issuance of fraud orders, and who, when such action was necessary, had authority to summarily direct the holding of the mail in any case pending final action by the Postmaster-General (R., 48).

Harlan knew when he telegraphed Burton on the Saturday night before that, notwithstanding that the Rialto Company would probably be able *locally to control the situation* and prevent a hostile report being forwarded to Washington it would not be able, unaided, to prevent summary action being taken by the Post-Office Department at Washington by reason of the developments at St. Louis. For that reason he wired Burton Saturday night, and Burton exercised his best judgment, as to what was necessary to be done at his "end of the line" to prevent action being precipitated by appearing at the Post-Office Department *before office hours Monday morning* and having an interview with the Assistant Attorney-General for that Department. He evidently assured Mr. Tyner, as he had assured Mr. Cochran, that the Rialto Company was all right, and that there was no necessity for summary action pending the report of the investigation then being conducted at St. Louis. At all events, his mission was successful, because no action of any kind was taken. (R., 116.) Another reason for believing that Burton went to the Department on this occasion to prevent summary action against the Rialto Company is found in his testimony on cross-examination when

he was asked to explain why in his letter of November 20th (R. 114) he had advised Harlan to take care of all complaints until the Brooks's matter was out of the way. He says: "I do not have any independent recollection of dictating the letter, but I take it that the reason was that *the indictment of Dennis being made public and Dennis owning the Rialto Grain and Securities Company*—in fact, I never disassoci[ate] the two; when I thought of the Rialto Grain and [Se]urities Company I thought of Dennis, and when I [th]ought of Dennis I thought of the Rialto Grain and [Se]urities Company—*would naturally cause more or l[ess] excitement and complaints might be sent in;* and my [ad]vice to him was to take care of it." (R. 244-245.)

Harlan's letter of December 3 to Burton, and Burton's reply furnish additional and convincing proof of the true relation between the Rialto Company and Burton, and of Burton's complete understanding of the pendency of a fraud order proceeding and the manner in which the investigation incident to and a part of such proceeding was being conducted. In his letter of the 2d, as we have s[een] Harlan was most apprehensive that a fraud ord[er] was imminent, so apprehensive, in fact, that on t[he] next day, December 3, he wrote Burton that on J. H. Bowman, representing himself to be a post-[office] inspector, and who had an account with the Ri[alto] Company, had called at the office of the compan[y] and "undertook to use his official position to forc[e] settlement of his account contrary to his just rig[hts], and did succeed, by reason of

his representation, in getting a little the best of the company." The letter continues:

> Now, this morning's mail brings us a letter from Colorado Springs from a Mr. Shove, which I inclose to you, and which indicates that some officer of the law—presumably some one that would leave the inference that he was a post-office inspector—had called on Mr. Shove. It is my opinion that these fellows are not what they represent themselves to be. *But if they are post-office inspectors then it would appear that some order has been issued—evidently from head-quarters—to try to catch the Rialto Company in a trap.* This they can not do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner. * * * To-day's mails have brought in a number of letters inclosing newspaper clippings, but most of the letters are very fair, and *if the situation gets no worse than it now appears*, the Rialto Company will have but little trouble in getting through with the situation. *Will keep you fully informed.* (R., 118.)

On December 9 Burton replied saying:

> *There has gone from this office* (Post-Office Department) *no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there.* * * * *I will take care of things at this end of the line.* (R., 119.)

When Burton used the expression, "the matter in St. Louis," he had reference to the investigation incident to the fraud order proceeding, and when he said it was in the hands of Mr. Dice, the inspector in charge at St. Louis, he thereby admitted that he knew not only about the procedure incident to such an investigation, but that such investigation had been ordered and was actually under way.

Burton's letter of January 19 to Harlan conclusively shows that it must have been originally understood that his services would begin immediately upon the acceptance of his proposal, for he says, speaking of the overdue draft for his salary, "As you recall it was due the 15th; this is the 19th. After this shall I make draft on the 15th?" (R., 120.) It will be remembered that Harlan in his letter of the 22d (R., 115) said that the draft should have been sent in his prior communication, that is, in the letter accepting Burton's terms to act as counsel. That this is the correct interpretation of the original agreement is further evidenced by the letter of January 22, 1903, addressed to Burton and signed "Rialto Grain and Securities Company, Hugh C. Dennis, president" (R., 122).

It is also clear from these two letters that the criminal trial of Dennis on the indictment based upon his connection with the Brooks Company had little, if anything, to do with the employment of Burton by the Rialto Company. In his letter to Harlan of the 19th, Burton casually says, "Have heard nothing from

you about the case. Please tell me how you came out." And Dennis, in his letter of the 22d, excuses Harlan's failure to forward the check by his interest in the Federal case against him, "which closed, as you *probably* know, by the court throwing the case out," etc.

On February 11, *nearly a month after the indictment against Dennis had been disposed of*, we find Burton writing Harlan and admonishing him *not to let Dice, the post-office inspector in charge at St. Lous, mislead him in any way.* Burton also says in this letter, "be sure and keep me advised if there is anything to do at this end of the line before going away. * * * If agreeable, on receipt of this, I wish you would have my monthly pay sent in so I can reach it by Monday next" (R., 124). Obviously Burton was referring to services before the Post-Office Department and in respect to the fraud order proceeding, on account of which Dice was then conducting an investigation at St. Louis of the Rialto Company.

Sometime in February, 1903, W. D. Mahaney, vice president of the company, became its active manager owing to the illness of Dennis (R., 156). That Burton had knowledge of the change, and fully understood the position of Mahaney in respect to the management of the company, is clear from his telegram of February 17, as follows: "Mr. W. D. Mahaney, Rialto Building, St. Louis, Mo.: Did you send paper Saturday? It has not arrived. J. R. Burton." (R., 154.) The "paper" referred to was a check, which Mahaney hastened to wire him had been forwarded.

If any further evidence was needed to conclusively establish the fact that Burton's employment contemplated and did, in fact, embrace services before the Post-Office Department, and in respect to all proceedings, controversies, investigations, and matters touching the issuance of a fraud order against the Rialto Company by the Post-Office Department, that evidence is found in the telegram sent Burton by Mahaney as manager of the Rialto Company on February 25, 1903, more than a month after the criminal proceedings against Dennis had been disposed of, in which Mahaney says:

> *Report to me to-day from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster-General. Please verify and advise at once.* (R., 155.)

Burton did verify and did advise by telegram dated February 27, as follows: "*No complaint in the Department against you. Will write full particulars by to-night's mail.*" (R., 155.) The letter which contained "full particulars," Mahaney testified was destroyed at Burton's request during the interview with Burton in the offices of the Rialto Company, at St. Louis, on March 26, 1903. (R., 149, 155.) Another of Burton's letters was also destroyed upon this occasion at his request.

For obvious reasons it is not customary for the Post-Office Department to notify those operating schemes to defraud when an investigation is to be made, and especially is this true when a special investigation is deemed necessary. Burton did not

hesitate, however, to ascertain whether a special investigation was contemplated by the Department by post-office inspectors other than those already detailed to the work at St. Louis. Had such a special investigation been contemplated, its purpose would have been thwarted by Burton in thus notifying the Rialto Company in advance. This was certainly service for which he was to receive and did in fact receive compensation.

In this telegram of February 27, notwithstanding his testimony on the witness stand, Burton furnishes convincing proof that he had knowledge of all complaints against the Rialto Company that had been received at the Post-Office Department up to that time, for his telegram states unequivocally that there was then no complaint *in the Department* against the company. He admits that he personally obtained this information at the Department. (R., 245–246.)

We have already seen that he had on November 20, 1902, the occasion of his first appearance before the Department in behalf of the Rialto Company, ascertained that complaints against the company were sent to St. Louis for investigation (R., 114, 119, 124), but that a carbon or duplicate jacket containing the names of all complainants was retained at the Post-Office Department (R., 94, 97, 159).

When, therefore, Burton made this inquiry, on February 27, the duplicate jacket in this case was necessarily referred to, that being the only record of the case then in the Department, and he was unquestion-

ably given "full particulars," as he had been on November 20; that is, the names of complainants and the fact that the complaints had been sent to Inspector in Charge Dice at St. Louis for investigation. It was precisely this information that enabled Burton to state in his telegram that there was no complaint *in the Department* against the company. Obviously, they were not in the Department as they had been sent to St. Louis. But for the destruction of Burton's letter containing "full particulars," I would be able to demonstrate with his own words the accuracy of this statement. (R., 155.)

On March 26, 1903, Burton appeared at the offices of the Rialto Company in St. Louis, and was there paid $500, the balance of the $2,500 due him from the Rialto Company. (R., 146, 147.) Mahaney testified that he then informed Burton that, inasmuch as Congress had adjourned and Burton's services were no longer needed at Washington, the company would discontinue its relations with him, and that Burton assented; that Burton agreed "that there was nothing of a dangerous character pending at the Department." (R., 149.) Hector C. McRae, comptroller of the company, was present during part of this interview and remembered Burton stating that "prior to his leaving Washington he had called at the Department and found there was nothing against the company; no complaints against the company." (R., 194.)

It will be noted that it was claimed by Burton, and conceded by the company, that his compensation should

commence as of November 15 (R., 120). Upon the present theory of the defendant the company was entitled to his services until April 15 at least, by reason of the payment of March 26. It is clear that his services were required, and were valuable to the company only while he was in Washington, where he could "take care of things at this end of the line."

As Mahaney testified, the fact that Congress had adjourned and Burton had left Washington, caused the company to relinquish its right to call upon him for services to which the company was entitled and for which he had been paid. He had protected the company when danger was imminent and the necessity for protection great, no new complaints were then being sent to the Department at Washington, and "locally" the company did not require his services as the investigation at that end of the line for some reason was not being vigorously pushed to a conclusion. For these reasons the company was willing to pay him the balance of his twenty-five hundred dollars and let him go his way.

On or about January 23, 1904, the day the first indictment of Burton was made public at Washington, Burton was interviewed, about 2.30 or 3 o'clock in the afternoon, by Mr. J. H. Aubere, a newspaper correspondent representing the St. Louis Globe-Democrat, and dictated a statement to Mr. Aubere. Mr. Aubere reduced the statement to writing, and at the trial produced the original interview and testified that "the

paper and the one that accompanies it is exactly what was said by Burton." (R., 189, 191.)

In this statement, it should be noted, Burton claims he was employed as attorney for *Major Dennis*, and called at the Department simply in behalf of *Dennis*. Elsewhere both Burton and Harlan state that he was employed as attorney for the Rialto Company, and it appears that he consented that his name should appear on its literature as its attorney (R., 198), and his name did, in fact, so appear (R., 74).

About 4 o'clock of that day Burton procured an interview with Chief Post-Office Inspector Cochran and Inspector in Charge Vickery, and stated to them, in substance, that he had appeared at the Department as an attorney for the Rialto Company and not in his capacity as Senator. He asked Cochran "what section of the law he was charged with violating" and was given its number. (R., 165, 178, 179.) During cross-examination Mr. Vickery said:

> The fee was for his appearance, as he related to Mr. Cochran—his appearance before the Department as attorney, because he quoted that he mentioned to Mr. Cochran on his visit with Mr. Cochran that he wouldn't antagonize the Department. (R., 179.)

The "visit" referred to was one of Burton's appearances before Cochran at the Post-Office Department in behalf of the Rialto Company.

After his interview with Cochran and Vickery he, Burton, went to Aubere's office and added to the statement which he had dictated to Aubere in the afternoon and in which he had said that on the occasion of certain visits to the Department he had repeated to Cochran his previous statement that he "was not there to oppose the wish, order, or rule of the Department in any shape, manner, or form," this significant clause, "*nor to act as an attorney before the Department for him*," meaning Dennis (R., 192). It is evident that between these interviews he had carefully read the statute and was trimming his sails and readjusting his position accordingly.

Charles H. Brooks, the originator of the Brooks Company, and concerning whom Burton had been fully and adequately informed by Harlan both in the conversation on the train to Chicago and in the letter of November 18 (R., 112), testified that he met Burton at McTague's restaurant, in St. Louis, early in January, 1903; that he (Brooks) was then president of the National Securities Company, another get-rich-quick concern operating through the use of the mails; that about 3 o'clock that afternoon Burton and Richard Kastor appeared at the office of the National Securities Company, and that Kastor thereupon, in Burton's presence and within his hearing, announced to Brooks that Burton was willing to represent the company before the Post-Office Department at Washington (R., 199–201).

Upon being assured by Brooks that the business of the National Securities Company was legitimate, Kastor said "that the Government *was investigating all*

speculative houses in St. Louis, and that it was only a question of time before they investigated my business." And he said: "If they do investigate your business Senator Burton can be of use to you before the Post-Office Department." Brooks asked "in what way the Senator could stop the investigation, or in what way he could render any assistance." Kastor answered, pointing toward Burton, "*Here's the man who has defeated you in your fight against Dennis and stopped the issuance of a fraud order.*" Brooks thereupon capitulated, and concluded that he had better also employ Burton to protect his business (R., 200, 201). Moreover Mahaney and McRae each testified that Burton in the interview of March 26 assigned as a reason for the destruction of his letters the fact that he had been criticised because of the *use made by the National Securities Company* of a letter signed by him (R., 149, 194). This testimony directly corroborates Brooks. The Brooks Company, for reasons already stated, was changed to the Rialto Company early in September, 1902, previous to Burton's employment, and Brooks testified that he had knowledge of the change (R., 201). Like Burton (R., 245), he failed to disassociate Dennis from the Rialto Company—when he thought of one he thought of the other. His fight was against Dennis and Dennis's company, under whatever name that company was known.

Burton did not deny meeting Brooks at lunch that day and admitted that he went to Brooks's office in company with Kastor, as Brooks testified. He did, however, deny that he agreed to represent Brooks, or

that anything was said about the Rialto Company. It is very significant, however, that he did not attempt to explain why he was there, and it is also significant that notwithstanding he had within a few days seen his friend Kastor, who lived in St. Louis, he did not place Kastor on the stand to corroborate his story. Brooks's testimony is reasonable and consistent. Burton's is neither.

Especial attention is directed to that part of Brooks's testimony, wherein he mentions that Kastor, during the interview between Burton, Kastor, and Brooks, said that *the Post-Office Department was investigating all speculative houses in St. Louis* (R., 200). This interview, Burton himself admits, occurred in St. Louis *early in January, 1903*, and during the very period covered by the indictment in this case. Can there be a shadow of a doubt that Burton was fully informed not only as to what was taking place in the Post-Office Department at Washington in respect to the investigation of the Rialto Company, but also as to every development at St. Louis in respect to that investigation?

The court is of course not called upon to determine the conclusiveness of this evidence. Its inquiry is limited to the question whether there was sufficient evidence of guilt to be submitted to the jury. This it is believed has been clearly demonstrated. Having in mind the situation of the parties when the agreement was made, the written statements by Burton as to what he was doing at "this end of the line" in regard to complaints against the Rialto Company, and the like statements by the officers of the company at that end

of the line as to what Burton was expected to do, and bearing in mind the letter of December 19, wherein Burton in effect said that the investigation was "in the hands of Mr. Dice," post-office inspector in charge at St. Louis (R., 119), the solicitude which Burton expressed in his letter of February 11, 1903 (R., 124), that Harlan should not let Dice mislead him in any way—Dice being the officer of the Department in charge of the investigation of the Rialto Company at that end of the line—and his telegram to the company on February 27 that he had ascertained that there was no complaint *in the Department* against the company (R., 155), his present contention that it was understood between him and Harlan in their conversation on the train that he was to be employed only with reference to the indictment of Major Dennis and the development of the securities department of the company, and was to have nothing to do with any investigation of the company by the Post-Office Department, is manifestly untrue. Nothing was ever done with the securities matter (R., 142); the indictment against Major Dennis had been dismissed, and still Burton continued busy keeping things straight at "this end of the line."

Coupling with the evidence referred to the testimony of Mahaney as to the reasons for discontinuing Burton's services after he had left "this end of the line," Brooks's testimony as to what Kastor said in Burton's presence, and manifestly at his instance, about Burton's having prevented the issuance of a fraud order against the Rialto Company in order to induce Brooks to employ him in behalf of the National Securities

Company, and Burton's equivocal and conflicting statements after his indictment as to the capacity in which he appeared before the Post-Office Department, can it possibly be said that there was no evidence whatever of Burton's guilt to be submitted to the jury?

AS TO THE PLACE WHERE THE AGREEMENT WAS MADE.

The evidence on this point was as follows:

On cross-examination by Mr. Lehmann, defendant's counsel, Mr. Harlan said (R., 130–131):

> A. The result was that Senator Burton expressed his confidence in that plan; and it was in that connection that I invited Senator Burton—I asked Senator Burton—to become associated with me as counsel for the Rialto Grain and Securities Company.
>
> By that time we had finished our lunch and went back—or forward, rather—into the library car.
>
> *I told Senator Burton, however, that I did not feel authorized to close any agreement. I told him that anything that we did would have to be taken up with Major Dennis and receive his confirmation and approval.*
>
> But, as I say, after we had gone into the library car I asked Senator Burton what, *in the event of his employment*, compensation he would expect; and after thinking for a moment he replied that he thought he should receive $500 a month. To that I made no reply; but, continuing, he said, "I don't think I ought to be shut off, however, at the end of a month. For instance, I would not want to go down and try that case, should Major Dennis be indicted, and then have

this employment cut off." He says, "I think it ought to continue for at least five months." I replied, "Why, certainly; that is only fair."

* * * * *

Question. You say *his proposal* was to serve for five hundred dollars a month, and for a period of not less than five months. What was said in that conversation as to when that employment was to begin?

Answer. There was nothing said as to when the employment was to begin.

Question. Do you recall when there was first anything said about when the employment was to begin? I call your attention to the letter of November 18, 1902, particularly the first paragraph of that letter, and ask you to read it.

Answer. "Mr. Kastor and I arrived safely and on time this a. m. I find myself confronted with a number of engagements which, together with Major Dennis's condition, prevented me writing you at as early an hour as I expected. *However, I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of five hundred dollars per month, said services to begin immediately, that is, of this date, November 18, 1902.*"

Question. When was that feature first stated? Was it in that letter, is what I want: the date of beginning?

Answer. Yes, sir; was mentioned to Senator Burton.

Question. In that letter?

Answer. Yes, sir. It was talked over between Major Dennis and myself before I wrote this letter.

Question. But I mean as between you and Senator Burton, that letter was the first?

Answer. Yes, sir.

Question. You went on to Chicago with Mr. Burton?

Answer. Yes, sir.

Question. And left the matter in that form; *that is, he proposing to serve for five hundred dollars a month for a period of not less than five months.*

(R., p. 132–133.)

Burton, upon direct examination by his counsel, testified (R. 234–235):

> When we came to the subject of fees, he asked me what I considered right as a salary per month. I don't know just how I got at it, but I think I mentioned $500 a month; and after some dickering backward and forward, or waiting, I don't remember which, he seemed to be satisfied. I said, "Now, Mr. Harlan, of course I don't want the responsibility of a case, or helping in a case of this kind"—I am trying to remember just the words there that I used.
>
> Question. Give the substance of it.
>
> Answer. At any rate, I didn't want to be retained in a case of that kind, for a man who was rich, for $500. The case might pass off within a month. He said, "Oh, that is not contemplated at all, Senator. You can help us in this other matter that we intend to come up; and as to that matter, time can be mentioned." Whether he mentioned it or I did, it was to be $500 a month for not less than five months. And he made the remark, "It will not terminate then

unless you terminate it." Now, so far as I remember, that was the substance of what was said.

When I parted with him that night he said *he had no authority to contract, but he would recommend that I be employed.* And if it was decided to employ me that he would come to Washington for a full conference.

There was one other subject discussed on that occasion, and in what connection I do not know, and that was whether there was any way to avoid the indictment against Dennis, or the threatened indictment against Dennis, and if not, what was the best way to reach it in taking care of it.

At the former trial, in reply to a question as to why he inquired of Chief Post-Office Inspector Cochran in regard to complaints against the Rialto Company, Burton said (R., 250):

I had been employed as counsel for the company. That I had this letter from Harlan (referring to letter of November 18) telling me that the tentative employment he had made had been ratified by the company. * * *

The court charged the jury as follows (R., 259–260):

2. If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in St. Louis, Mo.? Upon this question I charge you that if such an agreement was negotiated or tentatively effected at some other

> place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at St. Louis, Mo., to be there accepted and ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding, the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at St. Louis, Mo., and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Mo., and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by a telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had and the tentative agreement was made were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium.

This instruction was fully warranted by the evidence, and the instructions requested by the defendant on this point (thirty-ninth assignment of error) properly refused.

According to the construction placed upon the negotiations by defendant's counsel, "the matter was left in this form, he proposing to serve for $500 a month for a period of not less than five months." Harlan, as he advised Burton, had no authority to employ him. Burton's proposal, as shown by Harlan's letter of

November 18, was accepted by the company. As Harlan was to return to St. Louis and submit the matter to Major Dennis, and Burton was on his way to Washington, it was but just to assume that they contemplated further communication by mail or telegraph.

It is well settled that when acceptance of a proposal is made by letter or telegram, the contract is complete the moment the letter is mailed or the telegram dispatched, the *lex loci contractus* being the place where the letter or telegram is mailed or dispatched.

Taylor v. *Merchants Fire Ins. Co.*, 9 How., 390.

Patrick v. *Bowman*, 149 U. S., 424.

Garretson v. *North Atchison Bank*, 47 Fed., 867.

Phenix Ins. Co. v. *Schultz*, 80 Fed., 343.

Hammond on Contracts, sec. 42, note 22.

Burton's proposal was accepted as made. The circumstances attending the negotiation show that it was understood by the parties that if Burton's terms were accepted his services would begin immediately. The investigation of the Rialto Company had already commenced, the indictment of Dennis was impending, and if anything was to be done by Burton at the Post-Office Department in respect to either, as was evidently contemplated, the sooner it was done the better, for the danger of the issuance of a fraud order against the company was as imminent as the indictment of Dennis. In the absence of any stipulation to the contrary, Burton owed service to the company from the date of his employment.

The letter of November 18, 1902, notifying him of the acceptance of his terms and that his services were to begin immediately, was therefore an unconditional acceptance. That Burton's employment should begin at once and his salary be paid in advance is shown by Harlan's letter of November 22, in which he inclosed "the company's check for $500 as per agreement," saying, "This check should have been sent in my former letter, but I neglected to do so." The former letter was the letter of the 18th notifying Burton of the acceptance of his terms.

Burton's letter of January 19 also shows that the original agreement contemplated immediate service and payment in advance (R., 120).

But can any point be made of this alleged variation upon this prosecution? It is undisputed that Burton regarded the company's acceptance of his terms, as stated in Harlan's letter of November 18, as settling the matter of his employment. Accordingly, as appears from the letter of the 20th in response, he went at once to the Post-Office Department to look after the company's interests. A variation in the acceptance of the company from the terms of his proposal would only be important in the event he claimed no agreement had been reached. But he makes no such claim.

There was no agreement in the sense of the statute until the acceptance of the company had been given to the proposed arrangement. Not only the word "agree," but the other words of the statute—and it must be considered in its entirety in determining its meaning—imply a contractual relation. The statute denounces

an agreement to receive compensation for services rendered or to be rendered. There was no contractual relation, no obligation to render any services, no duty to pay, and hence no agreement to receive compensation for such services until the minds of the parties had met.

The court certainly will not construe the statute to apply to a mere offer which was never accepted. This is a penal statute, and therefore must be strictly construed; but it does not require a strict construction to hold that an offer to receive compensation for services to be rendered is not the same thing as an agreement to do so. Burton's proposal contained certain conditions which had to be accepted by the company before it could be said that he had agreed to do or receive anything. His proposal was a mere offer to violate the statute. His agreement constituted an actual violation thereof.

AS TO THE ADMISSION OR EXCLUSION OF EVIDENCE.

In the statement of the case, as presented by the evidence, the relevancy of the testimony referred to has been clearly shown. Under this heading, however, I shall discuss briefly the principal errors assigned by the defendant.

The several complaints against the Rialto Company, filed during the period covered by the indictment—November 18, 1902, to March 26, 1905—were all admitted, together with the accompanying pamphlets of the Rialto Company, for the purpose of showing that the scheme of the company had been challenged,

its good faith attacked, and that an investigation of the company was being carried on by the Post-Office Department at that time. It will be remembered that Cochran testified that, in response to the inquiry by Burton upon his first visit to the Department, as to whether "any complaints had been received or any investigation was under way," he had informed Burton that "there was such a case," and he advised him of the Evans and Hout complaints.

These two complaints, as the record shows, were jacketed and labelled "Alleged fraudulent scheme," and referred to the post-office inspector in charge at St. Louis for investigation and report (R., 95), a carbon duplicate, likewise labelled, being retained in the jacket upon which the history and disposal of the complaints and all subsequent papers were noted (R., 93, 96, 97).

Burton knew, therefore, that a case had been made up and sent out to St. Louis for investigation and report. He was specifically advised as to the Evans and Hout complaints, and, as heretofore pointed out, his telegram of February 27, 1903, to the company, shows that he must have been fully informed as to the three other complaints which were introduced in evidence (R., 155). But whether he was specifically informed of these three other complaints is immaterial. The correspondence between him and the officers of the Rialto Company shows that he knew the investigation had not been concluded; that the company was threatened with numerous complaints because of the indictment of Dennis; and that it was necessary to keep matters right at this end of the line in order to

prevent the Department from taking action in the case, and calling on Dice for a report.

The court admitted the testimony as to the preliminary oral report made by Inspector Price to Dice about November 14 (R., 210, 213, 229), but refused to admit the written report made by Price and Piatt on August 20, 1903 (R., 216), and the letter thereon of the Assistant Attorney-General for the Post-Office Department of September 9, 1903 (R., 226).

The latter documents were properly excluded. Burton's services terminated March 26, 1903, and any action taken by the Post-Office Department after that date could not be evidence for or against him.

It is contended, however (twenty-ninth assignment of error, R., 274–275), that the report of Inspectors Price and Piatt tended to show that there had not been formulated for investigation by the Postmaster-General or the Post-Office Department any case for determining whether the Rialto Company was conducting a scheme to defraud through the mails, etc., and that the letter of the Assistant Attorney-General for the Post-Office Department (thirtieth assignment of error, R., 276) tended to show that this matter was then for the first time formulated for investigation.

It is submitted that these deductions are entirely without foundation. The evidence as to the practice of the Post-Office Department in these fraud-order proceedings shows that the investigation begins when a complaint received by the Department is referred by the chief post-office inspector to the inspector in charge in the district where the concern involved is

operating for investigation and report. All that the Assistant Attorney-General did in this case was to suggest to the Assistant Postmaster-General that the case be *again* referred to the inspectors for further investigation.

It is also claimed that the report and letter referred to tended to show that the action of the Postmaster-General had been in no wise influenced by the defendant. This contention must be based upon the assumption that the report and letter exonerated the company. It is manifest that this was not the case. The inspectors were disposed to recommend that no fraud order be issued, upon the district attorney's advice, because, with the exception of a certain deal, they thought the company had conducted a *fairly honest* business "as bucket shops that are conducted through the mail exist." As a matter of fact, however, they submitted the report and evidence without recommendation for whatever action the Department might see fit to take. (R., 225.) We can understand the reason for the district attorney's advice from the preceding statement in the report that he would place the whole matter before the grand jury.

In his letter the Assistant Attorney-General for the Post-Office Department distinctly says that he regards "the representations which are made by the Rialto Grain and Secureties Company about the amount of profits which had been secured by the company for investors, as set forth in the report of the inspectors, as false and fraudulent, and when money is obtained even

for the purpose of investment upon such representations, the fraud statutes are violated;" that "if all possible evidence be collected along these lines" he will "be glad to call upon these companies to show cause why a fraud order should not issue against them at any time the inspectors see fit to make such a recommendation;" and that "it may be the inspectors will desire to return this case with such recommendation after the criminal proceedings are over."

In the statement of the case as presented by the evidence, I have shown the relevancy of the testimony of Huebner as to the visit paid by Burton to the Assistant Attorney-General for the Post-Office Department December 1, 1902, the morning of the day Congress met. I invite the court's attention to Burton's evasive and contradictory statements in regard to this visit. (R. 248–249.) He attempts to deny all recollection of it, at the same time asserting that it had nothing to do with the Rialto Company. Standing alone, the testimony as to this visit might not have been admissible; but in connection with all the circumstances, as developed on the trial, it was, unexplained (and no explanation was offered), clearly relevant and material.

It will be observed that there is no assignment of error covering the admission of Keyser's testimony as to Burton's visit to the Assistant Attorney-General's office on this occasion. (R., 181.)

AS TO INSTRUCTIONS GIVEN OR REFUSED.

The charge of the court set the entire case, as presented by the evidence, fairly and substantially before the jury. (R., 256–265.) This was sufficient.

Railway Co. v. *Whitton*, 13 Wall., 270, 290.

Tweed's case, 16 Wall., 516.

That portion of the charge defining a proceeding within the statute (referred to in thirty-second and thirty-third assignments of error) and stating what constituted service (thirty-fifth assignment of error) was clearly right and in accordance with the ruling of this court upon the former appeal that such a case was within section 1782.

The charge of the court as to the place where the agreement was made (thirty-fourth assignment of error) and the instruction it refused to give on behalf of the defendant in that respect (thirty-ninth assignment of error) have been already discussed.

The instructions refused in regard to the matter of services and the right of the defendant to make inquiries at the Department in behalf of the company were sufficiently covered by the charge and the instructions given. (R., 260, 265, instruction 10.)

The instruction set forth in the fortieth assignment of error was properly refused. The jury would not have been justified, as a matter of law, in finding defendant not guilty even if they were of opinion that no services were rendered by Burton before the Post-Office Department during the month covered by the payment of $500 on March 26, 1903, for the reason that such payment, even in that event, must be considered not

as a gratuity, but as a stipulated sum paid and agreed to be paid for the services rendered prior thereto. That is to say, the agreement, as proved by the uncontradicted evidence, was that Burton was to be employed for a period of not less than five months at a salary of $500 per month, the first payment to be made as of the 15th of November. He was entitled under the terms of the contract to the last payment of $500 whether he rendered any services during that particular month or not.

If no service was in fact rendered during that month the payment was to be attributed to the services previously rendered. It was not a gratuity, but a part of the total sum stipulated to be paid for the services agreed to be, and which were in fact, rendered by him before the Post-Office Department in relation to the fraud order proceeding.

The other instructions asked by the defendant, as to the presumptions of innocence and good character (forty-first and forty-second assignments of error) were sufficiently covered by the charge. (R., 261.)

SECTION 1782 IS CONSTITUTIONAL.

This statute does not interfere with the constitutional rights of the Senate or of the individual Senator. It prescribes no new qualifications for a Senator, nor does it interfere with the constitutional control of the Senate over him. It merely makes it unlawful for a Senator to do that which he has no moral nor constitutional right to do—to subvert his high office, entrusted to him for the benefit of the people of the United States, to the purposes of private gain.

The constitutional rights of Senators lie in the performance of their constitutional duties—that is to say, in the making of laws and treaties, etc. They have no constitutional right to appear for hire and against the interests of the Government before any of the Executive Departments or bureaus of the Government in any matter in which the United States is interested. In fact, that is plainly inconsistent with their Senatorial duties and obligations. With the performance of their constitutional duties as Senators no act of Congress could properly interfere. But when they forsake those duties and engage in matters plainly in conflict with their official obligations they must be amenable to law like other servants of the Government.

The Constitution itself recognizes this amenability of Senators and Representatives. They are privileged from arrest during their attendance at the session of their respective Houses in all cases "except treason, felony, and breach of the peace." (Art. I, sec. 6.) These words, Mr. Justice Story said, are the same as those in which the privilege of members of the English Parliament was expressed, and, as all crimes are offenses against the peace, the phrase 'breach of the peace' should be construed in accordance with the parliamentary rule to extend to all indictable offenses. (1 Story on Const., sec. 865.)

The provision of section 5 of Article II which authorizes each House to compel the attendance of absent members must be construed in the light of the above provision, which recognizes that members may be arrested for crime and the Senate thereby deprived of their attendance.

Counsel for plaintiff in error concede that a Senator is not above the law—the criminal *statutory* law—but say that "Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his *official conduct* as a Senator."

Does section 1782 place any restriction upon the "official conduct" of a Senator? Will it be said that when a man who is a Senator of the United States agrees to act as the paid attorney of a corporation before a Department of the Government in matters in which the United States is interested he is engaged in the performance of his official duties? We think not.

Section 1782 applies to individuals. It is aimed at all persons holding positions of trust or confidence in the service of the United States. The fact that it specifically refers to a Senator can not invalidate it. A general law against bribery or other crime would, counsel admit, include a Senator. Would the enumeration of Senators among those included in such a law invalidate it?

The provision of section 1782 that every person offending against the statute "shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States," is not open to constitutional objection. It does not interfere with the authority of the Senate over its members, because the position of Senator can not be construed to be an office under the Government of the United States within the meaning of that section.

Upon this point Judge Story, in his work on the Constitution (second edition), said:

> Section 793: A question arose, upon an impeachment before the Senate in 1799, whether a Senator was a civil officer of the United States within the purview of the Constitution; and it was decided by the Senate that he was not; and the like principle must apply to the members of the House of Representatives. This decision, upon which the Senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators. The reasoning by which it was sustained in the Senate does not appear, their deliberations having been private. But it was probably held that "civil officers of the United States" meant such as derived their appointment from and under the National Government, and not those persons who, though members of the Government, derived their appointment from the States or the people of the States. In this view the enumeration of the President and Vice-President as impeachable officers was indispensable, for they derive, or may derive, their office from a source paramount to the National Government. And the clause of the Constitution now under consideration does not even affect to consider them officers of the United States. It says, "the President, Vice-President, and *all civil officers* [not all other civil officers] shall be removed," etc. The language of the clause, therefore, would rather lead to the conclusion that they were enumerated, as contradistinguished from, rather than as included in the description

> of, civil officers of the United States. Other clauses of the Constitution would seem to favor the same result, particularly the clause respecting appointment of officers of the United States by the Executive, who is to "commission all the officers of the United States;" and the sixth section of the first article, which declares that "no person holding any 'office under the United States shall be a member of either House during his continuance in office;'" and the first section of the second article, which declares that "no Senator or Representative, or person 'holding an office of trust or profit under the United States shall be appointed an elector.'" If is far from being certain that the convention itself ever contemplated that Senators or Representatives should be subjected to impeachment, and it is very far from being clear that such a subjection would have been either politic or desirable.

The decisions of this court are inferentially to the same effect, as they hold that those only are officers of the United States in a constitutional sense and in the sense in which those words are employed in the statutes, who hold their places by virtue of an appointment by the President or a court of law or the head of a Department.

United States v. *Germaine*, 99 U. S., 508.

United States v. *Mouat*, 124 U. S., 307.

United States v. *Smith*, 124 U. S., 532.

Counsel endeavor to make a distinction between "officers of the United States" and the language of the statute, "office *under the Government* of the United

States." But if any distinction exists, we think it is against their contention. Judge Story, it will be observed, refers to Senators and Representatives as "members *of* the Government," while the provisions of the Constitution which he cites show that other positions in the service of the Government are referred to as offices *under* the United States. Section 5408, which relates to the destruction of public records by an officer of the United States and does not include Senators and Representatives, also used the phrase "office under the Government of the United States."

If Congress had intended that the effect of conviction of violating section 1782 should be to unseat a Senator or Representative, it would have said so. Certainly the court will not twist the words used from their usual sense so as to render the statute unconstitutional.

Properly read, the statute leaves the status of a convicted Senator as a member of the Senate to the determination of that body. They may or may not expel him, as they see fit. In this respect section 1782 is no different from any other statute.

It was surplusage for the court to include this declaration of the statute in its sentence. The disqualification referred to attaches by virtue of the law itself upon conviction.

If the sentence is defective in any respect, opportunity should be given to correct it. (*In re Bonner*, 151 U. S., 242.)

THE AGREEMENT TO RECEIVE AND THE RECEIPT OF COMPENSATION FOR THE ALLEGED SERVICES CONSTITUTED TWO OFFENSES.

Section 1782 in terms makes it unlawful to "*receive* or *agree to receive* any compensation whatever, directly

or indirectly, for any services rendered or to be rendered," etc.

It will not be denied that when any person referred to by the statute agrees to receive compensation for services to be rendered, the violation of the statute is complete, although he may never have received the compensation or rendered the services contemplated. This being so, is it to be said that he does not commit a fresh violation of the statute if he afterwards goes ahead and renders the service and receives the compensation therefor?

The receipt of compensation for such services is not necessarily preceded by an agreement. The services referred to may be rendered without agreement, and compensation afterwards received therefor. He who receives compensation for such services without a previous agreement to do so commits but one offense against the statute, while he who first agrees to receive compensation and afterwards does receive it necessarily commits two.

The case of *State* v. *Jones* (106 Mo., 302), cited by counsel, is not in point. The statute of Missouri there referred to made it unlawful for any person to "willfully *set fire to* or *burn* any dwelling house." Clearly to "set fire to" and "burn" are the same thing. But to agree to receive compensation and to actually receive it are different.

Section 1035 of the Revised Statutes, referred to by defendant's counsel, shows that an attempt to do a thing may be a separate offense.

The present case is analogous to that of a conspiracy to commit an offense against the United States, covered by section 5440, Revised Statutes, and the commission of the offense itself. In such a case the same facts may constitute two offenses, and this court has held that the punishment for the conspiracy to commit an offense may be greater than that provided for the offense itself. (*Clune* v. *United States*, 159 U. S., 590, 595.)

In *United States* v. *Rindskopf* (6 Biss., 259; Fed. Cas. No. 16, 165) it was contended that where an offense was actually committed the conspiracy was merged in the completed offense, but the court held otherwise.

But section 1782 stands upon a somewhat different ground, as it in terms creates two offenses, each of which may be committed independently of the other. In the present case we have an agreement to receive compensation, covering a period of five months and involving several payments. Manifestly, each of these payments constituted a violation of the provision against receiving compensation, and could be separately punished. Yet it is said that, if prosecuted for the agreement to receive this compensation, these several payments are beyond the reach of the statute. Clearly that can not be the case.

There being no error in the record, the judgment of the Circuit Court should be affirmed.

Respectfully submitted.

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